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IN THE

Supreme Court of the United States

CASCADE NATURAL GAS CORPORATION, *Appellant*, v. EL PASO NATURAL GAS COMPANY, *et al.*, *Appellees.*	No. 1090

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

BRIEF OF CASCADE NATURAL GAS CORPORATION IN OPPOSITION TO MOTIONS OF EL PASO NATURAL GAS COMPANY TO DISMISS OR AFFIRM AND OF THE UNITED STATES OF AMERICA TO DISMISS

Cascade Natural Gas Corporation ("Cascade"), appellant herein, respectfully requests this Court to deny the motions of appellee, El Paso Natural Gas Company ("El Paso") that Cascade's appeal be dismissed or, alternatively, that the order appealed from be affirmed and the motion of appellee United States of America that Cascade's appeal be dismissed.

FURTHER PROCEEDINGS BELOW

On March 29, 1965 (and not "just as its time for docketing was about to expire" as stated at page 13 of El Paso's Motion) Cascade petitioned the District Court for an order enlarging its time to docket. This petition is attached hereto as Appendix A. On April 7, 1965, counsel for Cascade learned on their own initiative that the District Court clerk had forwarded the record below to the clerk of this Court. By letter of that date, counsel for Cascade requested Judge Ritter to consider that part of its Petition for an order enlarging time to docket based

on the theory that such an order might obviate the necessity for appeal by Cascade if the initial decree of divestiture was not repugnant to Cascade on the point of the New Company's gas reserves. This letter is attached hereto as Appendix B. El Paso's counsel then submitted the matter to Judge Ritter upon Cascade's moving papers, the letter of Cascade's counsel dated April 7 and a communication dated April 8, 1965, attached hereto as Appendix C. Cascade concurred in a communication dated April 13, 1965, attached hereto as Appendix D. As late as Friday afternoon, April 16, Judge Ritter had taken no action on Cascade's Petition. Counsel for Cascade did not receive notice the Petition was denied until the following week when this appeal was docketed. El Paso's Motion to Dismiss or Affirm was made subsequent to the docketing of this appeal, was supplemented thereafter and was followed by the United States' Motion to Dismiss. In the meantime, appellees magnanimously stipulated between themselves that Cascade might be heard in the District Court as *amicus curiae* (without right of appeal) with respect to objectionable features of the now agreed decree of divestiture. However, Cascade has received no notice of any order of Judge Ritter that it might now enter these proceedings as *amicus curiae* or otherwise. Time to appear "granted" by counsel for appellees expires June 23, 1965.

ARGUMENT
CASCADE IS ENTITLED TO INTERVENE AS OF RIGHT IN THESE PROCEEDINGS.

A. Appellees have now admitted that Cascade will be adversely affected by the agreed decree of divestiture and should be heard.

By virtue of the Stipulation between Appellees in the District Court, these Motions should be denied and Cas-

cade should be summarily granted leave to intervene in these proceedings. Under Rule 24(a) (3) of the Federal Rules of Civil Procedure, Cascade must be granted leave to intervene if it is

> "... so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court..."

In *Sutphen Estates v. U. S.*, 342 U.S. 19, 96 L.Ed. 19, 72 S.Ct. 14 (1951) this Court held that the assets of a monopolist being judicially reorganized pursuant to the anti-trust laws are property in the custody or subject to the control or disposition of the court within the meaning of Rule 24(a) (3). Therefore, the gas reserves of El Paso, some of which are to be divested to New Company, are such property. Heretofore, the only question has been whether Cascade has satisfactorily shown the requisite adverse effects. Now, by virtue of the Stipulation, the decree of divestiture is settled, for all practical purposes. The Stipulation says:

> "... within said thirty days the court may hear the view of any affected person as an *amicus curiae*..."

and of this, El Paso, in its Statement Supplementing Motion (page 2) says:

> "Thus Appellants and all other persons deeming themselves adversely affected have until June 23, 1965, within which to appear before the District Court and object to the agreed divestiture decree."

By any realistic test, this constitutes an admission by appellees that Cascade is adversely affected by the agreed decree and has a right to be heard. The key to the courtroom, missing in *Sutphen Estates*, has thus been supplied to Cascade by appellees themselves, whatever the

effect of Cascade's own showing of harm in the District Court.

Cascade submits that this case has now come to the point where, on the record, Cascade must be allowed to intervene. The judicial policy of curtailing interventions under Rule 24(a) in government anti-trust cases is not impaired by recognizing the right to intervene in the unique situation here, where the Department of Justice and its adversary have stipulated the would-be intervenor is adversely affected enough to be heard as *amicus curiae*.

B. Cascade has made a sufficient showing of adverse effects to justify intervention as of right under Rule 24(a) (3).

In *Sutphen Estates*, the would-be intervenor failed because it failed to make a sufficient showing of adverse effects in the disposition of the properties of Warners subject to the control of the court. With awareness of that case, Cascade procured and submitted to the District Court, such expert analysis of the El Paso divestiture proposal as could be prepared in the time allotted. Cascade is sufficiently impressed by this evidence to feel obligated to pursue this appeal. Although counsel for El Paso professes to be astonished by Cascade's assertion that this evidence was unrebutted, the fact is that no rebuttal evidence was ever submitted by either appellee during the hearing on intervention. The fact El Paso has to point to a record made in Cascade's enforced absence to rebut Cascade's *prima facie* case for intervention in itself shows that Cascade should be a party to the fact-finding process leading to the framing of a decree herein.

There is nothing remote or speculative about Cas-

cade's evidence, particularly the projections of the analysis of El Paso's proposal by V. W. Ruskin and Associates Engineering, Ltd. of Vancouver, British Columbia, Canada, Consulting Engineers. They conform to the accepted methods of analysis in the natural gas industry. Moreover, they are 100% applicable to the agreed decree of divestiture, which certainly is to become the decree in this case, because that agreed decree adopts, without change, the provisions of the El Paso divestiture proposal pertaining to gas reserves. Paragraph IV-C, Decree of Divestiture, Stipulation, Appendix to Statement Supplementing Motions of El Paso, p. 6.

The studies submitted by Cascade in the District Court show that New Company is being started with reserves which are completely inadequate to serve Cascade. If New Company will not be able, in the near future, to deliver sufficient gas to meet the total gas requirements of its Pacific Northwest customers, how can it possibly expect to expand into the California markets as envisioned by this Court?

C. The United States has abandoned all pretext of protecting Cascade's interests in these proceedings.

In plaintiff's brief opposing defendant El Paso's plan of divestiture and presenting plaintiff's alternative plan filed in the District Court, the Department of Justice severely criticized the very allocation of gas reserves between El Paso and New Company which it now approves. The brief, said in part:

> **"II The Assets to be Divested**
>
> "The El Paso proposal is deficient not only in its failure to provide for an effective method of divestiture, but also in that it fails to make any provision

for the return of an allocable portion of the reserves acquired in the San Juan Basin during the period when competition from Pacific Northwest was suppressed; it fails to provide for the return of stock of Westcoast Transmission Company, Ltd. which was a Pacific Northwest asset; it fails to compensate for the substantial benefit which El Paso has obtained and of which Pacific Northwest has been deprived, arising out of certain tax losses of Pacific Northwest existing at the time of the merger; and it seeks to unilaterally modify contracts which existed between the two companies at the time of the merger. Plaintiff's proposed order provides for a correction of these deficiencies, which are discussed in the immediately succeeding portions of this brief.

" Allocation of Gas Reserves

"The gas reserves which El Paso proposes to divest to New Company in the San Juan Basin are, with very limited exception, the gas reserves which were owned or controlled by Pacific Northwest at the date of merger, less subsequent production. The volume of these reserves as reported by El Paso, at the time of the merger, December 31, 1959, including the reserves owned by Pacific Northwest's subsidiary, Northwest Production Company, were as follows:

	M³ cf - 14.73 p.s.i.a.
Leaseholds & Gas Rights	3,653,800
Gas Purchase Contracts	1,102,900
Total	4,756,700

"The volume of gas reserves proposed to be transferred to New Company at January 1, 1964 is as follows:

	M³ cf - 14.73 p.s.i.a.
Leaseholds & Gas Rights	1,751,300
Gas Purchase Contracts	766,800
Total	2,518,100

"This volume would be further reduced by the estimated production of 44.6 trillion cubic feet in the year 1964. This is less than the amount of gas Pacific

Northwest had in the San Juan Basin at the time of merger.

"The above figures indicate a shrinkage of 2.2286 trillion cubic feet during the intervening four year period although production amounted to only 203.5 billion cubic feet. It appears that for the year 1959 and prior years the *pore volume* method of reserve determination was used to estimate the reserves of both El Paso and Pacific Northwest. Because of FPC staff criticism of this method, El Paso changed its reserve estimation method to the *pressure decline* method in 1960. This change brought about a substantial reduction of the estimated gas reserve volumes in the San Juan Basin applicable both to gas acreage and gas purchase contracts acquired from Pacific Northwest as well as the acreage and gas purchase contracts which El Paso held at the time of the merger. These reductions resulted in the reserve volume of Pacific Northwest being reduced by 2.0866 trillion cubic feet. Applying this reduction to the estimated volume at December 31, 1959 results in a reserve volume at that date of 2.6701 trillion cubic feet.

"El Paso's reserves in the San Juan Basin at December 31, 1969 were reported as follows:

	M³ cf - 14.73 p.s.i.a
Leaseholds & Gas Rights	7,761,900
Gas Purchase Contracts	4,760,000
Total	12,521,900

"After divestiture El Paso would have gas reserves in the San Juan Basin as follows at January 1, 1964:

	M³ cf - 14.73 p.s.i.a
Leaseholds & Gas Rights	5,915,600
Gas Purchase Contracts	6,369,400
Total	12,285,000

"These volumes would be reduced by the 1964 production estimated at 300.322 billion cubic feet.

"Contrary to the situation as to New Company, El Paso would own or control a volume of gas reserves

in the San Juan Basin after divestiture which is in excess of the volume it had at the time of the merger, despite the reduction of 4.7524 trillion cubic feet due to changing the method of reserve estimation. When this reduction is applied to the December 31, 1959 reserve estimate the adjusted reserve volume at that date is 7.7695 trillion cubic feet.

"Based on the aforegoing adjusted reserve estimates at December 31, 1959, Pacific Northwest owned or controlled 25.59% of the total gas reserves owned or controlled by both Pacific Northwest and El Paso at that date based on the *pressure decline* method of gas reserve determination. However, under the Plan of Divestiture New Company would own or control at January 1, 1964 only 17.06% of the combined San Juan Basin reserves of New Company and El Paso at that date.

"The difference is due to the fact that with very limited exception all acquisitions of additional leaseholds and gas rights and all new gas purchase contracts acquired since December 31, 1959, have been retained by El Paso. Additions to gas reserves of New Company by reason of acquired leaseholds and gas rights and gas purchase contracts amounted to 148.1 billion cubic feet while such additions attributed to El Paso have amounted to 3.2993 trillion cubic feet. These reserve acquisitions cover the four year period from January 1, 1960 to December 31, 1963. However, during the three year period January 1, 1957 to December 31, 1959, while El Paso owned Pacific Northwest's stock, El Paso acquired a substantial amount of leaseholds and gas rights in the San Juan Basin while Pacific Northwest acquired none. El Paso also entered into a large number of contracts for the purchase of gas in the San Juan Basin in this period while Pacific Northwest entered into very few contracts and these contracts were in the area denominated by El Paso as the Pacific Area of San Juan and Rio Arriba Counties, New Mexico and LaPlata County, Colorado.

"El Paso's proposed divestiture of reserves in the San Juan Basin to New Company raises two serious

problems. First, the proposal is manifestly unfair in that it deprives New Company of any significant share of the gas reserves developed in the San Juan Basin during the period when El Paso controlled Pacific Northwest and also subsequent to the merger. Second, this proposed course of action would serve to impede and postpone the possible competitive thrust of New Company into the California market.

"It is apparent that El Paso has interpreted the Supreme Court's mandate to mean that it was only required to return to New Company the San Juan Basin reserves that it originally got from Pacific Northwest.

"Prior to El Paso obtaining control of Pacific Northwest, the two companies were in fierce competition in the acquisition of gas acreage and gas purchase contracts in the San Juan Basin. It is unthinkable that this competitive effort would have ceased in the absence of the stock acquisition by El Paso. It is certain that Pacific Northwest with its plan to invade the California market would have been most aggressive in obtaining gas reserves in the San Juan Basin and elsewhere along its pipeline. The favorable cost of the San Juan Basin gas reserves as compared with Canadian reserves which are located much farther from the California market was and continues to be of vast importance. It cannot be fairly assumed that the alert Pacific Northwest management would have sat on its hands and let El Paso gobble up all of the remaining uncommitted San Juan Basin reserves.

"In order that New Company will be in a position to compete for a share of the California market it must have at its command gas reserves in excess of what is proposed to be turned over to it by El Paso through the divestiture proceeding. While a fourteen year deliverability life, which New Company will have according to the El Paso plan may adequately meet FPC standards for the markets of New Company in Colorado, Wyoming and the Pacific Northwest, it is insufficient to take care of any major expansion project to serve the California market.

The minimum initial expansion would run from 150 million to 200 million cubic feet per day compared with New Company's 1965 projected average daily delivery of 870 million cubic feet. On the basis of an assumed 85% load factor operation for the California line, the delivery of 150 million cubic feet per day would require a minimum reserve of approximately 950 billion cubic feet and reasonably in the neighborhood of 1.25 trillion cubic feet in order to provide for a daily delivery life of approximately 14 years. The logical and most economical source of such gas reserves is in the San Juan Basin.

"We believe that New Company should obtain from El Paso such volume of gas reserves in the San Juan Basin as will place it in the same position, reserve-wise, to El Paso that it had at the time El Paso secured control. While even a minimum reserve addition of 600 billion would not, in itself, be adequate for a major project to serve California, it would greatly facilitate the early feasibility of such a project.

"The Supreme Court referred in its opinion to the location of the gas reserves of Pacific Northwest in relation to the potential California market and stated that had Pacific Northwest remained independent it no doubt would have sought to exploit its formidable geographical position vis-a-vis California.

"It would seem indisputable that a divestiture in accordance with the intent and purpose of the Supreme Court, in holding that El Paso had unlawfully acquired the stock of Pacific Northwest because such acquisition had the effect of lessening competition, must result in restoration of New Company to substantially the same position it had prior to acquisition, i.e., of having enormous gas reserves in the San Juan Basin strategically located with respect to the California market. El Paso should not be permitted, in purported compliance with the decision of the Supreme Court, to place the New Company at a disadvantage insofar as being a potential competitor in the California market through denying New Company its fair share of the additional gas reserves which

have been developed during the intervening eight years when El Paso had complete control of the acquisition by Pacific Northwest of gas reserves in the San Juan Basin.

"The consequences of the antitrust violation, which the Supreme Court decision was designed to rectify, would instead be perpetuated unless New Company is able to enjoy the fruits of the development of San Juan Basin gas reserves in which Pacific Northwest would have participated had it not been for the unlawful acquisition by El Paso of its stock."

All of the foregoing is applicable to the allocation of gas reserves under the agreed plan of divestiture, which is unchanged from the El Paso proposal on the subject of gas reserves. Yet, the United States has completely and abruptly abandoned its position and now acquiesces in an allocation of reserves which is not only unfair but which makes impossible restoration of the competitive situation existing before El Paso violated the Clayton Act. See *Reynolds Metals Company v. F.T.C.*, 309 F. (2d) 223 (DC Cir., 1962). Cascade will be bound by the decree, for as noted in the foregoing quotation, the Federal Power Commission will approve the reserves allocated to the New Company since they meet its regulatory standards and Cascade may, either contractually or by reason of business compulsion, be obliged to do business with the New Company, as successor to El Paso's contracts.

New Company needs considerably less gas reserves to obtain a Federal Power Commission certificate of public convenience and necessity than it needs to adequately meet Cascade's interruptible requirements, to expand into California or to approach the reserve position Pacific Northwest Pipeline Corporation would have enjoyed but

for El Paso's violation of the Clayton Act. Therefore, the "assumption" in the footnote on p. 8 of the United States Motion to Dismiss that the Federal Power Commission will deny a certificate to New Company is too far-fetched for Cascade. In Cascade's view, the allocation of reserves made here is final and irrevocable, Cascade is vitally affected and has no recourse elsewhere.

These proceedings entered a new phase with the order of this Court that the remedy of divestiture be applied. In this phase, the principles of intervention enunciated in *Missouri-Kansas Pipeline v. U. S.*, 312 U.S. 502, 506, 85 L.Ed. 975, 61 S.Ct. 666 (1941) apply:

> "But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the district court's discretion."

In truth, the combination of El Paso and Pacific Northwest Pipeline Corporation benefited Cascade by giving it a stronger supplier. The Clayton Act demands the end of the combination. But the private interest of Cascade in not being put in a *worse* position than it would have been but for the combination must also be safeguarded in this proceeding because such interest can be safeguarded nowhere else. It is up to this Court to see that Cascade "suffers no more than its fair share of whatever losses may result from the enforcement of the anti-trust laws." Black, J. dissenting in *Sutphen Estates v. U. S.*, 342 U.S. 19, 96 L.Ed. 19, 72 S.Ct. 14 (1951).

Cascade, as intervenor, will assert its private interests by showing that the agreed plan does not deprive the monopolist El Paso of the benefits of its violation of the

Clayton Act. *Schine Chain Theatres v. United States*, 334 U. S. 110, 92 L.Ed. 1245 (1947). El Paso should be required to divest to the New Company the gas reserves in the San Juan Basin and elsewhere which it has been able to acquire solely because of its illegal acquisition of Pacific Northwest Pipeline Corporation. If this is done, New Company will commence with reserves on the order of magnitude of those which, as envisioned by this Court, Pacific Northwest would have had but for the illegal activities of El Paso. Cascade then will not have been harmed by these divestiture proceedings. Since the Justice Department, for apparent political reasons, is now reluctant to enforce the full mandate of this Court, Cascade, as the party which will bear the brunt of such failure, must be allowed to assert its right to a proper decree of divestiture and therefore must be allowed to intervene by virtue of Rule 24(a) (2) of the Federal Rules of Civil Procedure.

The principles of *Atlantic Refining Company v. Standard Oil Company*, 304 F.(2d) 387 (DC Cir., 1962) are applicable. The intervenors in that case, sought to come in to contend for the validity of a regulation under which they derived benefits. Intervention was allowed, the court distinguishing *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 81 S.Ct. 1309, 6 L.Ed.(2d) 604 (1961), relied on by appellees, at page 393 as follows:

> "There can be no doubt that the appellants in *Sam Fox* could have maintained a private independent action for injunctive relief against ASCAP and its officers and directors to obtain the relief they sought by intervention in *Sam Fox*. And there is no reason why a court of equity in a private suit brought by the appellants in *Sam Fox* should consider the 1960 modified decree as anything more than a minimum toward

insuring broader representation and more favorable income distribution and should a claim for further relief be made out by such appellants in such private suit, the court could grant such relief, so long as it was consistent with the 1960 decree and did not release or lessen the limitations and requirements imposed by that decree. Hence, intervention was not vital to the appellants in *Sam Fox*.

"But the appellants in No. 16,725 cannot maintain an action against *Standard* to have Sec. 10(b) adjudged valid and if *Standard* obtains a judgment in the action, adjudging such section to be invalid, there is no remedy they can invoke against *Standard* to obtain redress for the substantial injuries they will suffer as a result of such judgment. Such judgment will be as final and conclusive to them as if they were bound by it under the doctrine of *res judicata*. Hence, intervention is vital to the appellants in No. 16,725.

"We are of the opinion, as this Court held in *Textile Workers Union of America v. Allendale Co.*, 96 U.S. App. D.C. 401, 226 F.(2d) 765, c.d. 351 U.S. 909, 76 S.Ct. 699, 100 L.Ed. 1444, that in actions brought by a private person to have an order or regulation of an administrative agency adjudged invalid, the *res judicata* test for determining whether an applicant for intervention in the action will be bound by the judgment therein is unworkable and inappropriate. This, because, as we have shown in the instant case, a judgment invalidating the order or regulation will result in substantial injury to those deriving direct benefit therefrom and will be as final and conclusive to them as if they were bound by it under the doctrine of *res judicata* and no remedy will be open to them to redress the loss they will suffer because of such judgment.

"[4] We conclude that the appellants in No. 16,725 will be bound by the judgment entered in the instant case, within the meaning of Rule 24(a) (2)."

Cascade is in the position of the intervenors in *Atlantic Refining v. Standard Oil Company, supra*. It derives di-

rect benefits from El Paso's substantial reserves and stands to suffer substantial injury for which it will have no redress, by the agreed decree of divestiture. Therefore, intervention is vital to it.

D. Cascade's interest in the gas reserves within the jurisdiction of the District Court is such as to entitle it to intervene as of right.

This Court has heretofore granted intervention as of right where the intervenor asserts a contingent claim against a trust fund in the custody of the court. *Barnes v. Alexander,* 232 U.S. 117, 34 S.Ct. 276, 58 L.Ed. 530 (1914). As stated by Moore,

> "The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action." 4 Moore's Federal Practice, Para. 24.09, p. 55.

Certainly the finite supply of gas which is to be allocated in these proceedings between El Paso and New Company constitutes a very significant fund for purposes of intervention. This Court, in this case, has taken particular note of the characteristic dedication of markets in the natural gas industry necessary to justify expensive pipeline construction. *U. S. v. El Paso Natural Gas Company, et al.,* 376 U.S. 651, 12 L.Ed.(2d) 12, 84 S.Ct. 1044 (1964). This court said at p. 19:

> "In this regulated industry a natural gas company (unless it has excess capacity) must compete for, enter into, and then obtain Commission approval of sale contracts in advance of constructing the pipeline facilities. In the natural gas industry pipelines are very expensive; and to be justified they need long-term contracts for sale of the gas that will travel in them. • • • Once the Commission grants authorization to construct facilities or to transport gas in

> interstate commerce, once the distributing contracts are made, a particular market is withdrawn from competition."

Construction of Cascade's distribution system was justified by the reciprocity of the long-term commitments mentioned by this Court and in particular, by long-term availability of gas at favorable interruptible rates. The reserve position of Pacific Northwest Pipeline Corporation, initially, and of El Paso following the merger, was crucial in this justification. After divestiture, as noted by this Court in the quoted passage, Cascade, by its contracts and in the absence of competitors to New Company will be obliged to obtain its gas from New Company. This, and the substantial expenditures of Cascade made heretofore in reliance on the reserve positions of Pacific Northwest Pipeline Corporation and El Paso give Cascade an inchoate claim in equity to those gas reserves sufficient to justify intervention as of right. *Tift v. Southern Ry. Co.*, (C.C.S.D. Ga. 1908) 159 Fed. 555; *R. M. Smythe & Co. v. Chase National Bank*, 291 F.(2d) 721 (2nd Cir., 1961). In the *Tift* case, the basis for the claim in intervention was the promise of the railroads to refund overcharges to shippers. The Court allowed intervention by shippers who had not been parties when the promise was made. Exhibit 5 to Cascade's Memorandum of Evidence, Law and Argument filed in the District Court is a letter written by the Chairman of the Board of El Paso to the Chairman of the Board of Cascade dated July 17, 1963, which says.

> "In order to assist you in meeting the competition of other fuels, beginning July 1, 1963, we will maintain the present interruptible industrial rate at its present level for three years and will not increase it for another two-year period by an amount in

excess of one mill per therm. In addition, we will make this interruptible service available to you for a ten-year period beginning July 1, 1963, the rate for the second five-year period to be such rate as is approved by the Federal Power Commission upon application by the Company under Section 4(e) of the Natural Gas Act."

This exemplifies the dedication of reserves mentioned above, is analogous to the promise of the railroads in *Tift*, and confirms Cascade's right to intervene in these proceedings.

CASCADE'S APPLICATION FOR INTERVENTION WAS TIMELY

Cascade applied to the District Court for leave to intervene as soon as it became aware of the adverse allocation of gas reserves between El Paso and New Company proposed by El Paso in its form of divestiture decree. This was at the outset of the hearings on the plan of divestiture, in effect a separate proceeding.

Cascade's intervention is solely concerned with the decree and not with re-litigating the first phase of the case wherein the Clayton Act violation was found. Therefore, the rights of existing parties to the case are not prejudiced and intervention should be granted. *Kozak v. Wells*, 278 F.(2d) 104, 109 (8th Cir., 1960).

Timeliness of an application for intervention under Rule 24(a) depends on the particular facts of each case. 4 Moore's Federal Practice, para. 24.13 [1] p. 97, 98. An application for leave to intervene as a matter of right was timely where the application was filed shortly after the intervenor received the first information which led it to intervene. *Knapp v. Hankins* (ED. Ill. 1952) 106 F. Supp. 43.

It has also been held that a motion to intervene to assert a claim to property in the Court's custody is timely if the property is still in the court's possession. *Marx v. Maddrey* (ED. S.C. 1952) 106 F. Supp. 535. The fund, in this case the gas reserves of El Paso, is still in the custody of the District Court. *Sutphen Estates v. U. S.*, 342 U.S. 19, 96 L.Ed. 19, 72 S.Ct. 14 (1951).

As stated in *Pellegrino v. Nesbit*, 203 F.(2d) 463, 465 (9th Cir., 1953):

> "In determining the timeliness of such a motion a court should consider not only the period of time that has passed but also the circumstances contributing to the delay."

Cascade submits that in the circumstances of this case, it has been diligent and should be allowed to intervene to protect its rights.

THE ORDER DENYING INTERVENTION IS APPEALABLE

In the federal courts, the appealability of an order denying intervention depends upon the nature of the applicant's right to intervene. If intervention is claimed as of right, the order is appealable. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company*, 331 U.S. 519, 916 L.Ed. 1646, 675 S.Ct. 1387 (1946). *Sutphen Estates v. U.S.*, 342 U.S. 19, 96 L.Ed. 19, 72 S.Ct. 14 (1951). Anno. 96 L.Ed. 25, Anno. 15 A.L.R.(2d) 340, 360. This is the rule where denial of intervention is a practical denial of relief to which the intervenor is entitled and which he can only obtain by intervention. In such cases, the order denying intervention is appealable since it finally disposes of the intervenor's claim. *Credits*

Commutation Co. v. U. S., 177 U.S. 311, 315, 44 L.Ed. 782, 20 S. Ct. 636 (1900).

Since Cascade claims intervention as a matter of right the order denying its application is appealable.

THIS COURT HAS JURISDICTION OF THIS APPEAL

El Paso contends this appeal was docketed one day late and should therefore be dismissed. The requirement of Rule 13(1) that a case be docketed within 60 days of the time the appeal is taken is not jurisdictional and the contention is without merit. Moreover, the appellee must take the steps under Rule 14(2) for dismissal before the appellant dockets the appeal. This El Paso has not done. *United Public Workers v. Mitchell*, 330 U.S. 75, 84-86, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Cascade directs the Court's attention to the difficult position in which it was put by the District Court's failure to grant or deny its petition for an extension of time to docket. The District Court had Cascade's petition under consideration for 18 of the 60 days allowed by Rule 13(1). Hopeful that the petition would be granted, Cascade delayed filing its Jurisdictional Statement until the pressures of time and distance forced it to act. Even then, it did not know what the District Court's action would be. Therefore, Cascade's appeal should be considered on its merits.

RESPONSE TO COLLATERAL CONTENTIONS OF EL PASO

First, this Court should not be misled by the syllogism paraded by El Paso as "truths" respecting Cascade's appeal. It is perfectly obvious that evidence offered by an intervenor is intended to have an impact on any decree

based on a hearing, and to prevent, if possible, the entry of an erroneous and unappealable order which may adversely affect the rights of such intervenor. If, as Cascade has contended, it has brought itself squarely within the requirements for intervention, it is entitled to present its case for whatever effect it may have on the ultimate decree. Furthermore, the argument of El Paso that the appeal is a device to obtain review of a decree not yet entered is now moot, for we know what the agreed decree will provide. It is a decree which the plaintiff's attorneys once thought contained more objectionable provisions than Cascade contends for.

Second, there is no merit to El Paso's contention that if Cascade is allowed to intervene, all other state commissions and distribution companies may also do so. Cascade's effort to protect its private interests jeopardized in these proceedings is no class action: Each commission and other would-be intervenors must stand or fall on their own merits. It is again emphasized that only Cascade, of all the would-be private intervenors in these proceedings, submitted a *prima facie* case of record in support of its right to intervention.

Third, it is of no possible concern on the merits of Cascade's right to intervene, that the proceedings would have to be reopened. Cascade did its best to avoid just such a contingency in making its timely application for intervention. Responsibility for erroneous consumption of time and effort as a result of exclusion of Cascade lies squarely upon the parties who opposed Cascade and upon the Court below, which excluded it.

Fourth, El Paso alleges Cascade wants to litigate rate

and other regulatory questions. This is not so. Cascade simply wants to assure the establishment of a New Company which will possess the gas reserves contemplated by the original decision of this Court, in the only tribunal where this can be accomplished. The reserve issue far transcends rates and other regulatory matters, and once settled by the District Court, is beyond the power of regulatory bodies to affect.

CONCLUSION

The Motions of the Appellees should be denied and this Court should summarily reverse the District Court's order and grant Cascade's application to intervene in these proceedings forthwith.

Respectfully submitted,

H. B. JONES, JR., and
JONES, GREY, KEHOE, HOOPER & OLSEN
Counsel for Appellant,
Cascade Natural Gas Corporation

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, *Defendants.*	Civil No. 143-57

PETITION FOR ORDER ENLARGING TIME FOR DOCKETING CASE

CASCADE NATURAL GAS CORPORATION ("Petitioner"), by its attorneys R. B. HOOPER and JONES, GREY, KEHOE, HOOPER & OLSEN, hereby petitions this Court for an Order enlarging the time within which its appeal herein must be docketed in the United States Supreme Court. In support of this Petition, Petitioner respectfully shows:

1. Petitioner's Application for Leave to Intervene herein was denied by this Court on January 22, 1965.

2. Petitioner's Notice of Appeal to the United States Supreme Court was filed in this Court February 18, 1965, and Petitioner requested preparation of a transcript of the record for transmission to the Clerk of the Supreme Court of the United States by the Clerk of this Court.

3. Rule 13 of the Rules of the United States Supreme Court requires an appellant to docket the case and file the record thereof with the Clerk of the United States Supreme Court not more than sixty (60) days after filing notice of appeal, but for good cause shown, any judge of the Court

whose decision is being appealed or in which a notice of appeal is filed may enlarge the time for docketing the case, provided application is made within the original sixty (60) day period.

4. For a showing of good cause, Petitioner states:

(a) The Application of another applicant for intervention for a stay of these proceedings pending disposition of its appeal of this Court's order denying it intervention has been denied, both in this Court and by Justice Douglas of the Supreme Court, so it appears to Petitioner that any application it might make for a stay of proceedings would likewise be denied, and, that the decree of divestiture will be entered by this Court before Petitioner can prosecute its appeal to a successful conclusion.

(b) This Court's final decree of divestiture might contain provisions assuring New Company adequate gas reserves so that it will be as capable of supplying Petitioner's long-term interruptible gas requirements as the presently constituted El Paso and Pacific Northwest. If this happened, and other aspects of the Plan were not harmful to Petitioner, it would then have no further need to prosecute its appeal, and considerable expense and inconvenience to all parties could be avoided.

(c) If, in its estimation, the final decree of divestiture is harmful to it, Petitioner would desire to prosecute its appeal vigorously to achieve modification of the decree. Petitioner seeks to preserve its rights to that end pending issuance of this Court's decree of divestiture.

(d) Petitioner is informed that due to various circumstances, including illnesses in the Clerk's office, the volume of the documentary evidence submitted by Petitioner in support of its Application for Leave to Intervene, which must all be incorporated in the transcript, and the time Petitioner has required to determine its proper course of action in these complicated circumstances, the transcript of the record may

not be ready for filing in the Supreme Court within the sixty (60) day period prescribed by Rule 13.

Based on the foregoing, Petitioner respectfully requests this Court to enter its order enlarging the time in which Petitioner must docket its appeal in the Supreme Court of the United States pursuant to Rule 13 of the Supreme Court Rules to not more than sixty (60) days after the date this Court enters its initial decree of divestiture in these proceedings.

Alternatively, if this Court does not see fit to enter such an order, Petitioner respectfully requests that this Court enter its order enlarging the period prescribed by Rule 13 from sixty (60) days to one-hundred twenty (120) days from filing of the notice of appeal herein.

DATED at Seattle, Washington, this 22nd day of March, 1965.

JONES, GREY, KEHOE, HOOPER & OLSEN

By .....

Attorneys for Petitioner
Cascade Natural Gas Corporation

APPENDIX B

[LETTERHEAD OF JONES, GREY, KEHOE, HOOPER & OLSEN]
April 7, 1965

The Honorable Willis W. Ritter
United States District Court
District of Utah
Salt Lake City, Utah 84101

Re: C143-57 United States of America
vs. El Paso Natural Gas Co., *et al.*
Our File No. 4955-F-14(d)

Dear Judge Ritter:

Confirming my telephone conversation with Deputy Clerk Ruth Bailey yesterday, we understand that the Clerk's office has forwarded the record on appeal to the Clerk of the Supreme Court. However, our client, Cascade Natural Gas Corporation still desires you to consider that part of its Petition For Order Enlarging Time For Docketing Case which requests the entry of an order enlarging the time in which Cascade must docket its appeal in the Supreme Court of the United States pursuant to Rule 13 of the Supreme Court Rules to not more than sixty (60) days after the date you enter your initial decree of divestiture in these proceedings. Cascade relies on paragraphs 4(a), 4(b) and 4(c) of its Petition as constituting good cause in support thereof, notwithstanding that the record is ready within the sixty day period prescribed by Rule 13.

We understand from Mr. Brennan that under the procedures in your court, you set the time for hearings on motions.

We have received letters from the Federal Power Commission and the Solicitor General indicating that the Federal Power Commission and the United States, respectively, will not oppose our Petition. We have also received letters from counsel for El Paso Natural Gas Company indicating that they will oppose our petition.

We will appreciate your setting the time for hearing of our Petition at your earliest convenience.

Very truly yours,

JONES, GREY, KEHOE, HOOPER & OLSEN

By

W. C. Anderson

WCA:bc

cc: Mr. Gregory A. Harrison
Mr. Dennis McCarthy
Mr. Leon M. Payne
Federal Power Commission
Solicitor General

APPENDIX C

BROBECK, PHLEGER & HARRISON
ATTORNEYS AT LAW
One Eleven Sutter Street
San Francisco 94104
SUtter 1-0666

April 8, 1965

Honorable Willis W. Ritter,
Chief Judge,
United States District Court,
District of Utah,
Central Division,
Federal Post Office Building,
Salt Lake City, Utah.

Re: United States v. El Paso Natural Gas Company—Civil No. 143-57.

Dear Judge Ritter:

Cascade Natural Gas Corporation has filed a "Petition for Order Enlarging Time for Docketing Case" seeking leave to delay docketing its appeal to the Supreme Court from the order denying its application to intervene until 60 days after the Court has entered a divestiture decree.

One of the grounds relied on in the petition is that "due to various circumstances, including illnesses in the Clerk's Office" the Clerk will be unable to forward a transcript of the record to the Supreme Court Clerk within the time provided for docketing the appeal. However, by their letter of April 7, 1965, counsel for Cascade acknowledge

that the transcript has been forwarded to the Supreme Court Clerk and, therefore, that this ground is without merit. All that remains to docket the appeal is for Cascade to file its printed jurisdictional statement in the Supreme Court and pay the docketing fee.

Counsel state that Cascade wishes, nevertheless, to have its time to docket extended until after a divestiture decree is entered.

The order appealed from is the order of this Court denying Cascade's application to intervene. Cascade is not a party to the action and is without standing or other right to appeal from any decree the Court will enter.

It appears from the petition, and counsels' letter of April 7, that the petition is simply a device to convert Cascade's appeal from the order denying intervention into an appeal from any final decree entered by the Court which displeases Cascade.

The petition thus asks the Court to recognize not only that Cascade has standing as a party but also that it has the right to appeal from a decree entered by the Court in the future. This is directly contrary to the Court's order already entered that Cascade is not entitled to become a party in intervention.

We find nothing to support Cascade in the summary denial by the Supreme Court of Mr. Bennett's application for a stay of proceedings in the action, especially since Cascade's counsel concede that any similar application by Cascade also would be denied.

The trial of the divestiture issues has been concluded and the matter has been submitted to the Court for deci-

sion. Any question respecting Cascade's right to intervene has become moot.

Cascade has been notably dilatory in prosecuting its appeal. It filed its notice of appeal on almost the last day permitted by law and the 60-day period provided by the Supreme Court Rules for docketing its appeal has nearly expired. Cascade's purpose and intent is clear. It never intended to pursue its appeal from the order denying intervention, but delayed prosecuting the appeal awaiting this Court's divestiture decree, intending to appeal from the decree as though it had intervened and become a party.

Since the time remaining under the Supreme Court Rules for docketing will expire in a little more than two weeks, El Paso is content to submit the matter to this Court for decision upon Cascade's moving papers, the letter of Cascade's counsel dated April 7, and this communication.

We ask that the petition be denied.

Respectfully submitted,

GREGORY A. HARRISON
Attorney for Defendant
El Paso Natural Gas Company

GAH:np

cc:

The Solicitor General,
Department of Justice,
Washington, D. C.

William H. Orrick, Esq.,
Asst. Attorney General,
Department of Justice,
Washington 25, D. C.

Larry L. Williams, Esq.,
Antitrust Division,
Department of Justice,
Washington 25, D. C.

Lawrence F. Noble, Esq.,
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Department of Justice,
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William T. Thurman, Esq.,
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Salt Lake City, Utah.

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Salt Lake City, Utah 84111.

Richard A. Solomon, Esq.,
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Federal Power Commission,
441 G Street Northwest,
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William I. Harkaway, Esq.,
Federal Power Commission,
441 G Street Northwest,
Washington, D. C.

Messrs. Jones, Grey, Kehoe,
Hooper & Olsen,
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Seattle, Washington 98104.

APPENDIX D

[LETTERHEAD OF JONES, GREY, KEHOE, HOOPER & OLSEN]

April 13, 1965

The Honorable Willis W. Ritter
Chief Judge
United States District Court
District of Utah, Central Division
Federal Post Office Building
Salt Lake City, Utah

Re: United States v. El Paso Natural Gas Company, *et al.*, Civil No. 143-57—Our File No. 4955-F-(14)(d)

Dear Judge Ritter:

We are in receipt of a copy of Mr. Harrison's letter to you dated April 8, 1965, in which he states that El Paso is content to submit the matter of Cascade's "Petition for Order Enlarging Time for Docketing Case" for decision upon Cascade's moving papers, our letter to you dated April 7 and his letter. Cascade too is content to submit

the matter on the basis of those papers and this communication.

Cascade's reasons for its Petition are clearly stated therein. They do not include contriving "a device to convert Cascade's appeal from the order denying intervention into an appeal from any final decree entered by the Court which displeases Cascade," because Cascade is not in need of such a "device." The precedents indicate to us that whether or not the Petition is granted, Cascade's appeal will extend to the merits of the divestiture decree as they affect Cascade. Where intervention is claimed of right, the inquiry of the Supreme Court extends to the merits. *Sutphen Estates v. United States*, 342 U. S. 19, 72 S. Ct. 14, 96 L. Ed. 19 (1951). Moreover, the Supreme Court has heretofore treated the appeal of a would-be intervenor whose application has been denied as an appeal from a final decree on the merits in an antitrust matter subject to the Expediting Act. *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, 88 L. Ed. 1188, 64 S. Ct. 905 (1944) reh. den. 322 U. S. 771, 88 L. Ed. 1596, 64 S. Ct. 1257, 15 ALR 2d 334, 341.

We ask that our Petition be granted.

Respectfully submitted,

JONES, GREY, KEHOE, HOOPER & OLSEN

By

W. C. Anderson

Attorneys for Cascade Natural Gas Corporation

WCA:bc

cc: Mr. Gregory A. Harrison
Mr. Dennis McCarthy
Mr. Leon M. Payne
Federal Power Commission
Solicitor General